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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN DIAZ,

Defendant and Appellant.

2d Crim. No. B218837
(Super. Ct. No. PA059758-01)
(Los Angeles County)

Steven Diaz appeals from judgment after conviction by jury of attempted murder and assault with a firearm. (Pen. Code., §§ 664/187, subd. (a) & 245, subd. (a)(2).)¹ The jury found true allegations that the attempted murder was willful, deliberate and premeditated (§ 664, subd. (a)) and that appellant personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subds. (b), (c) & (d)). The jury also found true allegations that in the assault appellant used a firearm and inflicted great bodily injury (§§ 12022.5, 1192.7, subd. (c), 667.5, subd. (c) & 12022.7, subd. (a)), and that he committed both crimes for the benefit of, at the direction of, or in association with, a street gang, and with the specific intent to promote, further or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)). The trial court sentenced appellant to 40 years to life in state prison, consisting of a term of 15 years to life (§ 664,

¹ All statutory references are to the Penal Code unless otherwise stated.

subd. (a) & 186.22, subd. (b)(5)), plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). The court stayed the sentence for the assault. (§ 654.)

We reject appellant's contention that there was not sufficient evidence to support the jury's finding that the gang allegations were true, but agree with appellant that the imposition of attorney's fees was not supported by a finding of an ability to pay. We will also direct the trial court to correct an unlawful sentence on the attempted murder.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant is an admitted member of the San Fernando, or SanFer, street gang. Appellant's victim, Cesar Rivas, joined a tagging and partying crew, called the Cyclones or Cys in about 2005. Cys did not have a relationship with SanFer at that time.

In the summer of 2006, Rivas had a discussion with his parents about his future and he decided to join the army. His shipping out date was in November of 2006. His parents sent him to live and work with an uncle in Florida from August until November. Rivas returned to Los Angeles in November for his shipping out date, but it was postponed to February.

In 2006, some members of Cys had begun committing crimes to develop power in order to become a gang. In about December 2006, they were approached by SanFer members who told them they could not be a gang in SanFer territory; they could either join SanFer or disappear. Some Cys members joined SanFer, but a lot of them "walked away." Rivas testified that eight or nine of about thirty Cys members joined SanFer. While he waited to ship out, other Cys members introduced Rivas to SanFer members, but Rivas did not join SanFer.

On January 16, 2007, Rivas drove to a high school to pick up a friend. The school was in SanFer territory and many SanFer members went to the school and lived in the area. It was an early dismissal day. Lots of people were around. Appellant stood at a nearby bus stop with several people, including a SanFer member and a person who had been a Cys member and was now associated with SanFer. Rivas knew appellant was a SanFer member. They had been introduced by a Cys member three weeks earlier. There was no prior personal animosity between them.

Rivas pulled up to a stop sign near appellant. His windows were down. Appellant made a SanFer hand sign to Rivas. Rivas said, "Don't throw that shit this way. I ain't no fucking flapper." "Flapper" is a disrespectful way of saying San Fernando. Rivas parked around the corner. He got out of his car, and walked over to his friend at a bus stop across from appellant. They remained in place for about 20 minutes. Someone told Rivas he was going to get jumped. He stayed where he was until his friend was ready to leave. Appellant and the people with him stayed across the street.

Eventually, Rivas returned to his car with his friend. When he got into the driver seat and reached across to the passenger seat to unlock the door, he saw that his friend was running away. He heard his driver's side window "blow." He turned and saw appellant, reaching a gun through the window, pointing at his head. Rivas turned away to shield his face, and was shot twice. He saw appellant run away. He did not see appellant's companions.

One bullet lodged near Rivas' lung and one lodged near his spine. He survived and was hospitalized for three weeks. At the time of trial he was enrolled in a university.

A gang expert testified that, based on his personal experience arresting and interviewing members, the primary activities of SanFer were murder, attempted murder, sale of narcotics, witness intimidation, robberies, burglaries, and grand theft of automobiles.² He testified to several specific crimes committed by SanFer gang members, including murder.

In his opinion, a hypothetical shooting like that described by Rivas' testimony, would be committed for the benefit of SanFer. Appellant would have thrown up a hand signal to show SanFer's dominance. The SanFer members would have felt disrespected by Rivas' derogatory response, especially around a high school and other members. It would make them look weak and would be terrible for recruitment and for

² Los Angeles Police Officer Alonso Menchaca testified as a gang expert. He had spent the last two and a half years in a gang unit specializing in SanFer. He was familiar with appellant.

intimidating people. By taking responsive action they would show strength and improve recruitment by demonstrating what could happen, even in broad daylight, to those who would not join. It would also show the community that SanFer ran the area. The presence of at least one other SanFer member also indicated that the crime was committed in association with the SanFer gang. The crime would promote, further or assist criminal conduct by other SanFer members because it would make anyone they tried to recruit more likely to join, having seen the consequences of refusal what happened to someone who did not. It would also make members of the community unlikely to report crime, making it easier for SanFer members to commit crimes.

The defense theory was that appellant assaulted Rivas with a firearm, but he did not intend to kill him, and that appellant was too high on methamphetamine to know what he was doing. Appellant testified to essentially the same sequence of events as did Rivas, except that appellant said Rivas said "Fucking flappers" a second time when he returned to his car. Appellant testified that he shot Rivas because Rivas disrespected him and he was angry. He said he shot Rivas but only intended to scare him. He said he had been using methamphetamine for several days and everything happened very quickly. Medical expert testimony was presented about methamphetamine use. In rebuttal, several officers testified to appellant's conflicting statements about his memory and his drug use.

DISCUSSION

Sufficiency of Evidence to Support the Gang Enhancements

Appellant contends the evidence is insufficient to support the jury's finding that the criminal street gang enhancements were true because there was insufficient evidence that the crime was committed for the benefit of or in association with SanFer or with specific intent to promote, further or assist criminal conduct by its members. We disagree.

Section 186.22, subdivision (b), increases punishment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any

criminal conduct by gang members" In assessing the sufficiency of evidence to support a judgment, we review the entire record in the light most favorable to the judgment, to determine whether reasonable and credible evidence exists to support the decision of the trier of fact. (*People v. Young* (2005) 34 Cal.4th 1149, 1180; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) We do not reassess the credibility of witnesses or reweigh the evidence. (*Olguin*, at p. 1382.)

A rational trier of fact could conclude that these crimes were committed "for the benefit of" SanFer because the crimes protected its reputation, facilitated its efforts to recruit reluctant Cys members, and prevented it from appearing weak in the community. By all accounts, the shooting was precipitated by Rivas's derogatory statement about SanFer. The victim and the gang expert testified that in the weeks preceding the crime, SanFer had been pressuring Cys members to join SanFer with limited success. Rivas was a Cys member and was introduced to appellant, but did not join SanFer. A few weeks later, when appellant threw up a gang sign in Rivas' presence, Rivas openly expressed his disrespect for SanFer. He did this in front of SanFer members, near a high school in SanFer territory, while many members of the community were present. Moreover, there was evidence that the crime was committed in association with a street gang. Although Rivas did not see other SanFer members at the moment he was shot, he testified that appellant was with at least two gang members during their initial conflict, and that they remained with appellant during the stand-off. They conferred with appellant next to a car that arrived right before Rivas was shot. These facts supported an inference that appellant committed the crimes in concert with other gang members. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.)

There was also sufficient evidence to support the finding that appellant acted with specific intent "to promote, further or assist" criminal conduct by SanFer members. Appellant testified that he had no personal animosity toward Rivas and that it was Rivas' disrespectful statement about SanFer that motivated him to shoot Rivas. The gang expert testified that when a gang is disrespected, the members are expected to take action to show its dominance. He testified that a gang member advances in a gang by

"putting in work" for the gang, which includes committing violent crimes. He testified that a member of SanFer would only be permitted to have the tattoos that appellant has if they have put in a lot of work for SanFer. Sufficient evidence in the record supports the jury's findings that the gang allegations were true.

Attorney's Fees

We agree with appellant, as does respondent, that the order requiring appellant to pay attorney's fees pursuant to section 987.8 must be reversed. The court did not conduct a hearing on ability to pay. We remand the case for such a hearing.

Section 987.8 authorizes the court to require a criminal defendant to pay the cost of appointed counsel only after a determination of present ability to pay after notice and a hearing. (*Id.*, subds. (b) & (f).) A defendant sentenced to state prison is presumed not to have ability to pay. (*Id.*, subd. (g)(2)(B).) The presumption is overcome only by an express finding of unusual circumstances. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537.) Here, appellant was not given the notice and hearing required by the statute. The error may be corrected on remand. (*People v. Flores* (2003) 30 Cal.4th 1059, 1068.) With no evidence of appellants' assets, we cannot determine that remand would be futile.

The Legally Mandated Sentence for the Attempted Murder

As respondent concedes, the sentence of 15 years to life, with a consecutive 25-year term for the firearm enhancement, must be corrected, because it does not comply with section 664, subdivision (a).

When, as here, the crime attempted is willful, deliberate, premeditated murder, the person guilty of the attempt shall be punished by imprisonment in the state prison for "life with the possibility of parole." (§ 664, subd. (a).) The minimum parole eligibility period is 15 years where the crime is for the benefit of a street gang within the meaning of section 186.22, subdivision (b)(5). Thus, the sentence for attempted murder should have been "life in prison with a minimum parole eligibility period of 15 years," not "15 years to life."

DISPOSITION

The abstract of judgment shall be amended to reflect the legally mandated sentence on count 1 of life in prison with a minimum parole eligibility period of 15 years, enhanced by a consecutive term of 25 years to life. (§§ 664, subd. (a), 186.22, subd. (b)(5) & 12022.53, subd. (d).) The trial court is further directed to send a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. The order requiring appellant to pay attorney's fees is vacated and the matter remanded for notice and hearing pursuant to section 987.8, subdivision (b). The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Cynthia L. Ulfig, Judge

Superior Court County of Los Angeles

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